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SUPREME COURT, U.S.
FILED

NO. 10-686

IN THE SUPREME COURT OF
THE UNITED STATES

Human Life of Washington, Inc.,

Petitioners,

v.

CHAIR BILL BRUMSICKLE ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The appellate opinion is reprinted in the Appendix ("Pet. App.") at 1a and available at 624 F.3d 990 (9th Cir. 2010). The district court opinion, Pet. App. 65a, is unreported but available at No. C08-0590, 2009 WL 62144 (W.D. Wash. Jan. 8, 2009).

STATEMENT

A. Washington's Campaign Finance Disclosure Law

Washington voters enacted Initiative 276 in 1972 and determined "[t]hat the public's right to know of the financing of political campaigns and lobbying . . . far outweighs any right that these matters remain secret and private." Wash. Rev. Code § 42.17.010(10). The "Disclosure Law," Wash. Rev. Code § 42.17, continues to serve this fundamental purpose of allowing the public and voters to follow the money in elections by providing timely information about campaign financing.

1. Definition of Political Committee

Like most states and the federal government, Washington requires committees involved in political campaigns to register and disclose certain contributions and expenditures. *See* Wash. Rev. Code §§ 42.17.040, -.060, -.080, -.090; *see generally* http://www.fec.gov/ (federal laws) and http://disclosure.law.ucla.edu (summary of state laws). Under Washington's statute, a political committee is a

person or organization (other than the candidate) having "the expectation of receiving contributions or making expenditures in support of, or opposition to . . . any ballot proposition." Wash. Rev. Code § 42.17.020(39); *see also* Wash. Rev. Code § 42.17.020(4) (definition of ballot proposition).[1]

Washington courts have recognized that the statute provides two alternative prongs under which an organization may be a political committee. An organization is a political committee when: (1) the organization expects to receive or receives contributions in support of or opposition to any candidate or ballot measure (the "receiver of contributions" prong); or (2) when the organization expects to expend or expends funds in support of or opposition to a candidate (the "expenditures prong"). *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894 (Wash. Ct. App. 2002), *review denied*, 66 P.3d 639 (Wash. 2003) ("*EFF*"). *See also Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 166 P.3d 1174 (Wash. 2007), *certiorari denied*, 553 U.S. 1079 (2008) ("*VEC*") (rejecting vagueness challenge to definition of political committee).

With regard to the "making of expenditures" prong, the state supreme court has narrowed this definition by ruling that the organization making expenditures must have as its "*primary or one of its primary purposes* . . . to affect, directly or indirectly,

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[1] The definition of political committee applies to "any person." The term "person" is defined to include "any other organization or group of persons, however organized[.]" Wash. Rev. Code § 42.17.020(36). For purposes of clarity, this brief will discuss application of the definition to "organizations."

governmental decision-making by supporting or opposing candidates or ballot propositions[.]" *State v. (1972) Dan. J. Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976) (emphasis added). The state court of appeals in *EFF* set out a detailed framework to evaluate the *Evans* court's primary purpose analysis. *EFF*, 49 P.3d at 903. *EFF* rejects a formulaic approach (such as a percentage of expenditures) to determine an organization's primary purpose. Instead, the framework examines the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission during the period in question. *EFF*, 409 P.3d at 903. The non-exhaustive list of analytical tools include (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission. *Id.*

2. Disclosures and Reporting Under Washington Law

A political committee must make certain disclosures. A political committee must file a one-page "statement of organization" with the Washington State Public Disclosure Commission ("PDC"), disclosing the name of the organization, related or affiliated committees or other persons, identification of officers and titles, and identification of a treasurer. Wash. Rev. Code § 42.17.040(2). A political committee must make periodic reports of the contributions it receives and the expenditures it makes relating to its support

or opposition of the ballot measure. [2] Wash. Rev. Code §§ 42.17.065, -.080.

Disclosure requirements apply only during the period that the group acts as a political committee. *EFF*, 49 P.3d at 904. Moreover, these requirements apply only to political committees that raise or spend more than $5,000 in a calendar year or that intend to raise more than $500 from any one contributor. Wash. Admin. Code § 390-16-105(2). Committees spending or raising funds below those amounts have the option of even fewer reporting requirements. Wash. Rev. Code § 42.17.370(8); Wash. Admin. Code §§ 390-16-105 through -125.

The Disclosure Law also requires disclosure of certain "independent expenditures" of $100 or more that support or oppose a ballot measure or candidate. Wash. Rev. Code § 42.17.100. Independent expenditures include certain political advertising, defined as "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for

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[2] The term "contribution" is statutorily defined and includes receipt of anything of value contributed for the purpose of supporting or opposing an election campaign, including a ballot measure. Wash. Rev Code §§ 42.17.020(15) ("contribution") and (18) ("election campaign"). The term "expenditure" is defined at Wash. Rev Code § 42.17.020(22) with reference to "furthering or opposing any election campaign."

financial or other support or opposition in any election campaign." Wash. Rev. Code § 42.17.020(38).[3]

The Disclosure Law requires ease of access to campaign finance information. Wash. Rev. Code § 42.17.367. The PDC website provides information related to laws and rules, filer assistance, manuals, training videos, and free electronic filing software, plus a searchable database of campaign finance information. PDC staff provide assistance to any person regarding reports and filing, and any person can obtain guidance from the PDC through requests for informal advisory opinions, declaratory orders (Wash. Rev. Code § 34.05.240; Wash. Admin. Code § 390-12-250), and PDC interpretations (Wash. Rev. Code § 34.05.230). The public and news media make extensive use of disclosed information.

Violations of Wash. Rev. Code § 42.17 may be pursued through an administrative or trial court action, and may be initiated by the PDC, the state attorney general, local prosecutors, or citizens acting on behalf of the state. Wash. Rev. Code §§ 42.17.395, -.400. Only civil remedies and sanctions are available in such administrative and judicial proceedings. Wash. Rev. Code §§ 42.17.360, -.390, -.400.

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[3] Wash. Admin. Code § 390-16-206, which is the object of Question 4 of the Petition, provides that certain ratings or endorsements do not need to be reported, including some persons who make an expenditure to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition. The exceptions include certain news media exemptions provided in Wash. Rev. Code §§ 42.17.020(15)(b)(iv), (21)(c) and exceptions for specified political advertising.

B. Human Life of Washington Activities In Washington Ballot Measure Campaigns

Human Life of Washington, Inc. ("HLW") incorporated in 1971 "[t]o aid, assist, instruct, educate, counsel, direct and participate in the dissemination of any and all information and material concerned with or involved in the respect and preservation of the value of human life," and "[t]o accomplish the purposes herein set forth . . . may . . . engage in any lawful activity either in its own name or in association with other persons, clubs, associations, corporations or other entity." HLW described its purpose as follows: "Through educational, *legislative*, and judicial efforts, we seek reform in our culture's understanding of personhood, view of life and freedom." (Emphasis added).

At times, HLW has pursued its stated mission by actively opposing ballot measures. In 1992, Washington voters considered and rejected Initiative 119 ("I-119"), which was promoted as a "death with dignity" law. HLW actively opposed I-119 directly and through its registered political committee, Human Life PAC. HLW made direct contributions and expenditures, contributed to other political committees, and filed reports. HLW's newsletters repeatedly called upon readers to "oppose," "defeat," "stop," and "reject" I-119, while calling for volunteers to doorbell and make contributions. When I-119 was defeated, HLW solicited funds using full page advertisements saying it spent "enormous amounts of money" opposing the measure.

This case arose after former Washington State Governor Booth Gardner formed a committee to

support an initiative regarding physician-assisted suicide in 2007. The ballot measure received national media attention from the time it was filed with the Washington State Secretary of State in early 2008. The measure became known as Initiative 1000 ("I-1000"). HLW sought to spend funds to oppose I-1000. It stated its intent to expend funds to "advocate" on the topic of I-1000, calling 2008 a "special opportunity" for HLW because "people are particularly receptive to arguments about the issue." The day I-1000 was filed, HLW released a "Special News Report" titled "Assisted Suicide Initiative Filed" directing actions by readers in three ways: (1) asking them to "encourage others not to sign the initiative," (2) linking them to entities opposing the initiative, including to the website of the Washington Coalition Against Assisted Suicide, and (3) providing links to "important resources to help you defeat this initiative." Contrary to HLW's assertion that it would use only 20 percent of its budget on I-1000, the record showed a significantly higher percentage would be used because HLW proposed expenditures on radio advertisements that ranged up to $50,000.

C. Proceedings In District Court

On April 16, 2008, HLW filed a complaint challenging the constitutionality of three Washington State campaign finance disclosure laws and one PDC rule, seeking both declaratory and injunctive relief. Pet. App. 124-145a. Count 1 challenged Washington's definition of "political committee" for using "a primary purpose" in the expenditures prong. It also alleged the use of the words "expectation" and "in support of, or opposition to" in the definitions of contributions and expenditure were vague or overbroad. Pet. App. 138-

139a. Count 2 challenged the definition of "independent expenditure" as vague and overbroad because it uses the terms "support" and "oppose." Pet. App. 142a. Count 3 challenged the definition of "political advertising" as vague and overbroad because it uses the terms "support" and "oppose," the phrase "directly or indirectly," and the phrase "mass communication." Pet. App. 142-143a. Count 4 challenged a PDC rule, Wash. Admin. Code § 390-16-206, because the rule included the terms "support" and "oppose."

The complaint and evidence submitted to the district court confirmed that HLW sought to spend money to engage in an advertising campaign directed at defeating I-1000 in the months leading up to the November 2008 election. The district court denied HLW's request for a preliminary injunction, denied HLW's motion for summary judgment, and granted summary judgment to the state defendants on all counts. Pet. App. 64-123a.

D. Proceedings in the Ninth Circuit Court Of Appeals

HLW appealed. The court of appeals stayed oral argument until this Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). By its stay order, the court of appeals authorized the parties to file supplemental briefing on any impact *Citizens United* would have on the issues, and both parties submitted additional briefing. Following argument, the court of appeals affirmed the district court. Pet. App. 1-63a.

As a threshold matter, the court of appeals held that the case was not moot, and that HLW met the requirements for standing and ripeness,

notwithstanding the passage of I-1000. Pet. App. 14-18a. Turning to HLW's challenges, the court of appeals held first that "exacting scrutiny" applied to HLW's arguments that the disclosure provisions of the law were unconstitutional. The court of appeals explained that *Buckley v. Valeo*, 424 U.S. 1 (1976), provided a clear endorsement that exacting scrutiny applies to challenges to campaign finance disclosure requirements. Pet. App. 21a. The Court also relied on *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) ("*Doe v. Reed*"), and *Citizens United*, which "clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important government interest." Pet. App. 24a (citing *Doe v. Reed*, 130 S. Ct. at 2828, and *Citizens United*, 130 S. Ct. at 914).

Applying exacting scrutiny, the court of appeals held that the challenged provisions "advance the important and well-recognized governmental interest of providing the voting public with" information relevant to voting. Pet. App. 31a. The state has an even higher interest in informing the electorate about the source of campaign money in the context of ballot measures. *Id.* Additionally, it held that Washington similarly has "sufficiently important" interests in disclosure of campaign finance information, and that the challenged disclosure provisions bore a substantial relationship to those important interests. Pet. App. 39a.

With regard to HLW's challenge to the definition of political committee, the court of appeals concluded that "[t]he Disclosure Law . . . is tailored to reach only those groups with a 'primary' purpose of

political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." Pet. App. 37a. The court of appeals rejected HLW's argument that *Buckley* should be read to limit disclosure requirements on political committees that have "*the*" major purpose[4] of election activities, ruling that the First Amendment does not categorically prohibit government from imposing disclosure requirements on groups with more than one major purpose. Pet. App. 34-36a (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*")). The court of appeals explained that "the word 'primary' - not the words 'a' or 'the' - is what is constitutionally significant" because the government's informational interest in disclosure is just as strong (or stronger) for groups with a primary purpose of election advocacy. Pet. App. 37a. Further, it explained that Washington's definition served an important public interest by ensuring that such groups would not circumvent and evade disclosure requirements. Pet. App. 38a.

Next, the court of appeals rejected HLW's argument that the disclosure requirements are unconstitutionally "onerous," again following this

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[4] The phrase from *Buckley* reads: "To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley*, 424 U.S. at 79.

Court's decision in *Citizens United*. Pet. App. 40a. "Like the requirements in *Citizens United*, Washington State's political committee disclosure requirements are not unconstitutionally burdensome relative to the government's informational interest. Rather, they are narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending and as an election nears." Pet. App. 42a. The court of appeals concluded that the Disclosure Law's "somewhat modest political committee disclosure requirements" meet exacting scrutiny because they "are substantially related to the government's interest in informing the electorate[.]" Pet. App. 44a.

The court of appeals then turned to, and rejected, HLW's argument that the Disclosure Law's definitions for "independent expenditure" and "political advertising" are vague or overbroad and lack a substantial relation to important government interests. Pet. App. 44a. HLW's vagueness and overbreadth argument claimed that the statutory definitions would reach issue advocacy, rather than express advocacy. The court of appeals concluded first that the proposed advertisements were the functional equivalent of express advocacy and subject to regulation under this Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003) *("McConnell")* and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (*"WRTL"*). Pet. App. 46-47a. But, even if the communications proposed by HLW were "issue advocacy," the court of appeals ruled that this Court has previously rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of

express advocacy." Pet. App. 47-48a (citing *Citizens United*, 130 S. Ct. at 915).

The court of appeals then held that the requirements imposed on "independent expenditures" and "political advertising" are substantially related to Washington's important informational interests. Pet. App. 49a. "As in *Citizens United*, Washington voters' interest in knowing who is speaking about physician-assisted suicide shortly before they vote on a ballot initiative that proposes to legalize that practice is sufficient to support the Disclosure Law's requirements." Pet. App. 51a. In particular, a ballot measure involves voters acting as legislators where "the government has a vital interest in providing the public with information about who is trying to sway its opinion." Pet. App. 51a. Furthermore, the court of appeals explained that there is less danger of disclosure regulations sweeping too broadly in the context of a ballot measure. Pet. App. 52a. The Disclosure Law "target[s] only those expenditures and advertisements made in conjunction with an ongoing election or vote." Pet. App. 53a. The requirements on groups, like HLW, are related to the existence of a ballot initiative campaign and the date of the election. Pet. App. 53a.

Next, the court of appeals rejected HLW's other vagueness arguments. It rejected HLW's challenge to the word "expectation," which is used in the definition of political committee. Under controlling Washington case law, the standard provides "concrete, discernible criteria necessary to prevent arbitrary and discriminatory enforcement[.]" Pet. App. 58a. Similarly, the court of appeals rejected HLW's objection to the term "mass communication" in the

definition of "political advertising," ruling that the term is clear because it is part of a list of ordinary and well-understood communications. Pet. App. 60a.

Finally, the court of appeals rejected HLW's as-applied challenge to the Disclosure Law, finding that HLW had offered no evidence to support such a challenge. The verified complaint cited by HLW was "devoid of information" to show the Disclosure Law was unconstitutional as applied to HLW. Pet. App. 61a. Moreover, the record did not establish that the complaint had been verified by a person with personal knowledge. Pet. App. 61a.[5] Thus, the only evidence in the record showed that HLW could easily meet the requirements of the law, and that the reporting requirements imposed by the law are "quite modest." Pet. App. 61a.

HLW filed its Petition For A Writ Of Certiorari with this Court on November 22, 2010.

REASONS FOR DENYING THE PETITION

The court of appeals concluded that Washington's disclosure requirements do not limit speech by an organization like HLW, and that the disclosure requirements are tailored to the well-recognized important interests of providing information to voters regarding who is financing the support of and opposition to a ballot measure. In reaching this conclusion, the court of appeals opinion

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[5] The CEO of HLW, who signed the verified complaint, could not, in fact, verify many sections of the complaint. He acknowledged that he did not have personal knowledge of certain factual contentions and that he could not verify the legal contentions.

closely follows this Court's rulings and presents no conflict with any decision of this Court. Nor does it present any genuine or important conflict with a decision by another circuit.

A. The Decision Below Is An Unremarkable Application of This Court's Precedent

HLW makes a number of arguments to claim that the court of appeals decision conflicts with decisions of this Court. As shown in this section, the decision below closely follows the Court's controlling precedent. HLW's claims of conflict are based on inapposite cases, on standards that are not supported by decisions of this Court, and on alleged standards that have been affirmatively rejected by this Court.

1. Consistent With This Court's Decisions, The Circuit Court Ruled That The Challenged Disclosure Requirements Are Subject To Exacting Scrutiny

HLW argues that the court of appeals determination that exacting scrutiny applies to the disclosure requirements in this case conflicts with decisions of this Court. Pet. 26-30. To the contrary, the court of appeals follows the Court's decisions from *Buckley* through *Citizens United* and *Doe v. Reed*, where this Court has held that exacting scrutiny applies to campaign finance disclosure requirements. Pet. App. 25a.

In *Citizens United*, the Court held that exacting scrutiny applies to the disclosure requirements. As the Court explained, "Disclaimer and disclosure requirements may burden the ability to speak, but

they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted). The opinion in *Citizens United* demonstrates that the formulation of exacting scrutiny used by the court of appeals, Pet. App. 25a, is well-established. "'[E]xacting scrutiny,' . . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (citing *Buckley*, 424 U.S. at 64, 66, and *McConnell*, 543 U.S. at 231-32).

In *Doe v. Reed*, the Court applied exacting scrutiny to Washington's law requiring public disclosure of the names of persons signing referendum petitions. *Doe v. Reed*, 130 S. Ct. at 2818. As in *Citizens United*, the Court distinguished between state laws that prohibit or limit speech and laws that compel disclosure, holding that exacting scrutiny applied because disclosure of the public records was not a "prohibition on speech[.]" *Id.* [6]

HLW's conflict argument is not premised on a claim that the Disclosure Law involves a prohibition on speech. Pet. 29. Instead, HLW seeks to bypass *Citizens United* and *Doe v. Reed* and apply strict scrutiny to Washington's disclosure laws. HLW's argument misreads *Citizens United*, citing to this Court's application of strict scrutiny to the federal law prohibiting corporations from spending money, where the Court rejected the FEC's argument that the

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[6] The public records disclosure provisions at issue in *Doe v. Reed* were enacted as part of the same initiative, I-276, that put in place the Disclosure Law.

corporation had the option to create a political committee. Based on this element of *Citizens United*, HLW claims strict scrutiny applies to disclosure requirements on political committees. Pet. 29.

HLW's argument is an unsound reading of *Citizens United*. While the Court in *Citizens United* addressed the option of creating a separate entity, it concluded that this option did not overcome the fact that federal law prohibited speech by the corporation. *Citizens United*, 130 S. Ct. at 898. The opinion makes it clear that the trigger for strict scrutiny is the prohibition on speech. This is also made obvious when the Court applies exacting scrutiny to examine the disclaimer and disclosure requirements on the same corporations, and explains that disclosure is a "less restrictive alternative to more comprehensive regulations of speech[.]" *Citizens United*, 130 S. Ct. at 915 (citing to *MCFL*, 479 U.S. at 262).

HLW's reliance on *MCFL* suffers from the same flaw as its reading of *Citizens United*. Both *Citizens United* and *MCFL* considered 2 U.S.C. § 441b, a statute prohibiting corporations from spending corporate treasury funds to advocate for or against federal candidates absent forming a separate and segregated fund. *See* 2 U.S.C. § 441b(b)(2), (4); 11 C.F.R. § 114.1 through –.8. As in *Citizens United*, the *MCFL* Court applied strict scrutiny based on the prohibition on corporate expenditures. *MCFL*, 479 U.S. at 252 (plurality opinion) ("corporation is not free to use its general funds for campaign advocacy purposes"). Thus, the court of appeals decision is not in conflict with *Citizens United* or *MCFL* because HLW does not claim (and did not show) that the Disclosure Law prevents it from speaking in its own name or

using its own funds. Indeed, HLW's Petition would simply reargue the Court's recent rulings that exacting scrutiny provides the relevant framework for reviewing disclosure requirements.

Alternatively, HLW argues that the Court has viewed the registration and disclosure for some political committees as "onerous" and contends that exacting scrutiny cannot apply to onerous burdens. Pet. 27. This proposal of a special standard based on the term "onerous" is again contrary to the Court's ruling in *Citizens United* that exacting scrutiny applies to disclosure requirements. *Citizens United*, 130 S. Ct. at 914. HLW can cite no case where this Court uses an "onerousness" standard, instead of exacting scrutiny, to compare disclosure requirements to state interests.[7]

HLW's argument in favor of two tiers of exacting scrutiny for disclosure provisions should likewise be rejected. Pet. 30 (suggesting that there is both "complaisant" and "high" exacting scrutiny). HLW does not show that any court follows its anomalous approach or that there is any confusion related to different tiers of exacting scrutiny. Further, there is nothing in the court of appeals opinion addressing these supposedly different tiers; instead, the formulation by the court of appeals

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[7] As an additional matter, HLW's repeated arguments that the disclosure requirements are onerous are not suitable for certiorari because no evidence supports HLW. As the court of appeals explained, HLW's case mounted only a facial challenge to the disclosure requirements. Pet. App. 60a. Virtually all the evidence in the record was supplied by the state and it showed that the requirements for political committees and independent expenditures are "modest." Pet. App. 44a.

squarely follows this Court's formulation of exacting scrutiny. Pet. App. 24a.

2. Washington's Construction of Political Committee Does Not Conflict With Opinions Of This Court

As discussed above at pp. 2-3, an organization is a "political committee" under the expenditures prong of the Disclosure Law if its "primary or one of the primary purposes" is "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *EFF*, 49 P.3d at 903 (quoting *Evans*, 546 P.2d at 79). HLW argues that *Buckley* holds that no organization can be required to register and provide disclosure as a political committee unless "*the*" major purpose of the organization is the nomination or election of a candidate. Pet. 16. HLW claims its view of *Buckley* is supported by *MCFL* and *McConnell*. *Id.* The court of appeals decision does not conflict with *Buckley*, *MCFL*, or *McConnell* because those cases do not support HLW's view that the First Amendment categorically prohibits a state from designating an organization as a "political committee" unless the organization's sole major purpose is campaign advocacy. [8]

The Court in *Buckley* used the phrase "the major purpose" to provide a narrowing construction to

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[8] HLW did not challenge below the constitutionality of the state's definition of political committee as it related to the "receiver of contributions" prong. Although HLW mentions this prong for the first time in the Petition at 8-9, it has not supported any challenge to the contributions prong with argument or authority.

the specific statutory definition of "political committee" in the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431, *et seq.* *Buckley*, 42 U.S. at 79-80. As the court of appeals concluded, nothing in *Buckley* suggests that the phrase is an absolute limit on when a state may seek disclosure by an organization involved in support of or opposition to a ballot measure. Pet. App. 34-35a. Instead, as the court of appeals found, Washington satisfies the constitution because its definition "is tailored to reach only those groups with a 'primary' purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." Pet. App. 37a.

HLW's reliance on *MCFL* to mandate use of "*the*" major purpose is also unsound because that case did not address that issue. *MCFL* dealt with an expenditure limit, which imposed a significantly higher First Amendment burden and, therefore, involved a higher level of scrutiny. Pet. App. 35a. As the court of appeals recognized, the Court in *MCFL* "considered whether the burden of a corporate campaign *expenditure limitation* was unconstitutional as applied to an ideological nonprofit; it did not consider a facial challenge to a disclosure requirement imposed on entities engaging in political advocacy." Pet. App. 35a (citing *MCFL*, 479 U.S. at 241) (emphasis added).[9]

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[9] HLW also argues for a conflict based on the phrase "the major purpose" by citing FEC notices that summarized case law. Pet. 18 (citing 72 Fed. Reg. 5595). Putting aside whether the FEC notices could be the basis to demonstrate a conflict, the notices do not endorse HLW's view that the Constitution requires rigid focus on "*the* major purpose."

HLW also contends that the Disclosure Law's use of the terms "support" and "oppose" are vague and overbroad, and that *Buckley* limits the State to examining only the organization's "expenditures and contributions of a single year" in order to determine an organization's political committee status. Pet. 24-25. HLW's argument is contrary to this Court's holding that the terms "support" or "oppose" are not vague or overbroad. *See, e.g., McConnell*, 540 U.S. at 170 n. 64 (explicitly holding that the terms "support" and "oppose" are not vague). In no case has the Court determined that disclosure laws regarding political committees are invalid by virtue of using the terms "support" or "oppose."

This Court has also never adopted HLW's purported tests for determining whether an organization is a political committee. Nor has any court held that only one particular method is appropriate for making such a determination. As discussed, *Buckley* provides a narrowing construction of a specific federal statute, not a singular approach that must be exported to every state's regulation of every type of political committee. This reading of *Buckley* is confirmed by *MCFL,* where the Court identifies other methods that could be used to ascertain an organization's "major purpose." *MCFL*, 479 U.S. at 252, n. 6 and 262); *see also Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d

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Instead, the FEC notice simply reviews case law and concludes that the "Court's major purpose test from *Buckley* has not been eliminated by federal legislation or case law." 72 Fed. Reg. at 5597 (discussing *McConnell,* 540 U.S. at 203-04). Read in context, the FEC notice falls far short of endorsing HLW's stringent use of "*the*" major purpose.

1137, 1152 (10th Cir. 2007) (*"CRLC"*) (reviewing how *MCFL* provided additional non-exclusive suggested methods).[10]

To claim that Washington's determination of primary purpose is unclear, HLW baldly asserts that Washington law does not provide adequate guidance. Pet. 23. This mischaracterizes the issue raised by this case because it ignores the record, the controlling construction of Washington's definition, and the wealth of guidance available. The record shows that since 1973, Washington's statute defining "political committee" has been interpreted to consider an organization's "primary purposes." *See* Wash. AGO 1973 No. 14, 1973 WL 153939 (Wash. Att'y Gen. June 8, 1973). As discussed previously and also by the court of appeals, state appellate decisions and PDC guidance have implemented primary purpose using objective factors. *See supra* 3-5.[11]

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[10] The state supreme court relied on *McConnell* to reject a challenge to the terms "support" and "oppose" as used in Washington's definition of political committee. *VEC*, 166 P.3d at 1184 (citing *McConnell* and holding that "support" and "oppose" are not unconstitutionally vague).

[11] The Court should also look past HLW's criticism of the court of appeals for citing an HLW email, where HLW argues that Washington does not regulate emails as "expenditures." Pet. 22. This email alone would not make an organization into a political committee under Washington law and that is not suggested by the court of appeals. In context, the court of appeal addresses the email as part of a larger record showing that HLW's primary purpose in 2008 would be to expend funds to oppose I-1000. Pet. App. 3-6a; 60-62a.

3. The Petition's Questions Regarding The Definition Of "Independent Expenditure" and "Political Advertising" Present No Conflict And Do Not Raise Important Questions Requiring Review

HLW's second and third questions presented ask the Court to address the definitions of "independent expenditure" and "political advertising". Pet. (i). The Disclosure Law defines "independent expenditure" in terms of money spent "in support of or opposition to" a candidate or ballot measure. Wash. Rev. Code § 42.17.100. "Political advertising" includes mass communications "used for the purpose of appealing, directly or indirectly" for votes for financial or other "support or opposition" in any election campaign. Wash. Rev. Code § 42.17.020(38). The Petition barely addresses these questions and fails to identify any conflict or important question warranting certiorari. *See* Pet. 32-33.[12]

The court of appeals determined these definitions are not overbroad because they do not burden more speech than is constitutionally

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[12] The Petition includes no analysis to support certiorari on its fourth question concerning Wash. Admin. Code § 390-16-206. As the court of appeals explained, one sentence of this rule uses the phrase "for or against" and HLW argued that it should say "expressly for or against." Pet. App. 55a, n.8. But, as the court of appeals concluded, the rule does not create any disclosure requirements; it simply clarifies that certain communications - such as newspaper editorials and news commentaries - are exempt from certain Disclosure Law's requirements for ratings and endorsements. Pet. App. 55a, n.8. HLW does not explain why review is warranted to address this rule.

permissible under exacting scrutiny. Pet. App 50-55a. It determined the reporting requirements imposed on independent expenditures and political advertising are substantially related to Washington's important informational interests, targeting only those expenditures and political advertising made in conjunction with an election or vote. Pet. App. 53a. Similarly, the court of appeals rejected HLW's vagueness argument with respect to use of the phrase "mass communication" in the political advertising definition. Pet. App. 60a. The court of appeals described that the term has an ordinary, contemporary, common meaning that clearly embraced HLW's proposed political advertising. Pet. App. 60a. Moreover, the court of appeals found there is no reason to believe the phrase "mass communication" would be vague in the vast majority of its intended application. Pet. App. 60a.

To assert a conflict concerning these definitions, HLW cites to *Buckley* and *MCFL*. HLW contends that "operative phrases" in those cases (which include "relative to a clearly identified candidate" and "for the purpose of . . . influencing the nomination of candidates" and "advocating the election or defeat of a candidate") have been found to be vague and overbroad. Pet. 33-34. The court of appeals decision, however, deals with different terms in the Disclosure Law and, thus, no conflict is presented.

The Petition appears to argue that *Buckley* held that disclosure depends on "magic words" of "express advocacy" and disclosure of anything else (including independent expenditures and political advertising that do not contain "magic words") is unconstitutional. Pet. 33. HLW describes *Citizens United* as "extending"

disclosure only to statutes that have a "very bright line" such as the federal electioneering communications definition. Pet. 34. In finding disclosure and disclaimer provisions constitutional, this Court in *Citizens United* unequivocally stated that disclosure requirements are not confined to speech that is the "functional equivalent of express advocacy." *Citizens United*, 130 S. Ct. at 915. Had this Court extended disclosure requirements only to those containing magic words, it would have said so.

The court of appeals, therefore, properly characterized HLW's arguments as those already rejected by this Court in *Citizens United*, and other precedents, concluding that HLW "does no more than reiterate arguments that have been rejected by the Supreme Court." Pet. 48a. For example, in upholding the application of disclosure requirements to electioneering communications, the court of appeals recognized that *McConnell* "rejected the notion that *Buckley* establishes 'a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech'." Pet. App. 48-49a (quoting *McConnell*, 540 U.S. at 190). Similarly, the court of appeals noted that HLW's reading of *WRTL* was rejected in *Citizens United*. Pet. App. 49a. As the court of appeals properly concluded, "imposing disclosure obligations on communicators engaged in issue advocacy is not *per se* unconstitutional; instead, the constitutionality of the obligations is determined by whether they are substantially related to a sufficiently important governmental interest." Pet. App. 49a.

HLW's challenge to the Disclosure Law's definitions of independent expenditure and political advertising, which enable disclosure, presents no conflict with decisions of this Court in order to warrant certiorari.

B. The Decision Below Creates No Circuit Conflict

HLW claims a conflict with the decisions of other circuits with regard to the lower court's application of "exacting scrutiny" and its rejection of HLW's rigid focus on "*the*" major purpose for political committee determination. *See* Pet. 19-21, 31-32. The circuit court cases cited by HLW, however, present no genuine conflict on the level of scrutiny required for disclosure provisions. With regard to evaluation of *Buckley's* "major purpose" analyses, the decisions are unique to the particular state statutes and do not reflect any genuine conflict.

1. HLW principally relies on a Fourth Circuit decision that predates critical decisions of this Court and creates no genuine conflict

HLW relies on the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) to support its circuit split contention. In *Leake*, a two-judge majority struck down North Carolina's definition of political committee based, in part, on its conclusion that, under *Buckley*, a political committee must be limited to organizations with "*the* major purpose" of electing or defeating a candidate. *Leake*, 525 F.3d at 287. The Fourth Circuit panel read *Buckley* to require that "the burdens of political committee designation

only fall on entities whose primary, or only, activities are within the 'core' of Congress's power to regulate elections." *Id.* at 288. For a number of reasons, the *Leake* decision does not reflect a genuine conflict with the decision below.

As an initial matter, *Leake* pre-dates both *Citizens United* and *Doe v. Reed*. The Fourth Circuit has not had the opportunity to consider this Court's most recent holdings regarding disclosure, and the important governmental and voter interests served thereby. The Ninth Circuit recognized that fact, stating that *Leake* "predates *Citizens United* and *Reed* and therefore is unpersuasive in the disclosure context." Pet. App. 45a, n.5. Further, no conflict is presented because the majority in *Leake* does not analyze the phrase "exacting scrutiny." HLW's claim of conflict on the level of scrutiny relies solely on the dissenting judge's argument that the majority inappropriately relied on strict scrutiny cases. Pet. 31. The Fourth Circuit should be allowed to address the level of scrutiny and apply *Citizens United* and *Doe v. Reed* before this Court concludes that a genuine conflict has developed.

With regard to the precise phrase "*the* major purpose" from *Buckley*, *Leake* presents no conflict because the majority expressly recognized that its conclusion regarding North Carolina's definition would not apply to Washington's definition of political committee. Responding to the dissent, the majority states that the Washington statutes addressed in the dissent's case law contain "none of the infirmities" the panel found in the North Carolina laws. *Leake*, 525 F.3d at 299 (citing to *VEC*). Furthermore, the majority in *Leake* relied on

a finding that North Carolina had not provided "potentially regulated entities with any idea of how to comply with the law." *Leake*, 525 F.3d at 289. This is distinguishable from Washington and the record below, which showed no such difficulties in complying with Washington's definition or its modest disclosure requirements for political committees.

The absence of a genuine or developed conflict between the Fourth and Ninth Circuits is further shown by the Fourth Circuit's rejection of various "bright-line" tests for determining major purpose. Similar to HLW's arguments, Pet. 22-26, the plaintiffs in *Leake* asked the court to hold that an organization could fall within the ambit of *Buckley's* major purpose test only if "(1) the organic documents of the organization list electoral advocacy as the organization's major purpose or (2) if the organization spends over 50% of its money on influencing elections." *Leake*, 525 F.3d at 289, n.6. The Fourth Circuit expressly declined those standards for determining whether an organization's major purpose is the support or opposition of candidates. *Id.* ("[w]e need not determine in this case whether [the plaintiffs' standard] is the only manner in which North Carolina can apply the teachings of *Buckley*").[13]

Finally, prior panels in the Fourth Circuit have not accepted a rigid view of "*the*" major purpose

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[13] HLW asserts that *Leake* also held that the "*only* two regulable communications" are the "*federally* defined" terms of "independent expenditures" and "electioneering communications." Pet. 34 (emphasis added), citing to *Leake* at 525 F.3d at 284. HLW significantly misstates *Leake*, which contains no such sweeping holding.

as did *Leake*. Specifically, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court of appeals determined that *Buckley*'s definition of "political committee" was construed to include only those entities that have as "*a* major purpose" engaging in express advocacy in support of a candidate. *Bartlett*, 168 F.3d at 712.[14] The Ninth Circuit's reading of *Buckley* is thus similar to the Fourth Circuit in *Bartlett*. *See* Pet. App. 32a-33a.

2. The decision below comports with other circuit court opinions

Once *Leake* is addressed, there is no substance to HLW's other claims of conflict between the circuits.

HLW cites the Tenth Circuit's ruling in *CRLC*, *supra* at p. 20, to claim a conflict regarding exacting scrutiny. Pet. 31-32. But first, the *CRLC* decision is a pre-*Citizens United* and *Doe v. Reed* decision and thus presents no conflict. Second, the Tenth Circuit in *CRLC* applied strict scrutiny to a provision similar to that at issue in *MCFL*, whereby corporations were banned from making electioneering expenditures. *CRLC*, 498 F.3d at 1141, 1146. HLW's complaint does not involve such restrictions. Third, the Tenth Circuit has applied exacting scrutiny in a more recent case challenging disclosure requirements, which dispels HLW's claim that the Tenth Circuit would apply strict scrutiny in a challenge to

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[14] In the Petition, HLW cites *Bartlett* as standing for *the* "major purpose". Pet. 20. The quotation provided in the Petition obscures the fact that *Bartlett* used the word "*a*" before "major purpose." *See Bartlett*, 168 F.3d at 712 ("a major purpose").

Washington's Disclosure Law. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010).

HLW broadly asserts, without discussion, that five other circuit courts "recognize" "*the*" major purpose test. Pet. 19 and n.18 (citing decisions of the Second, Seventh, Tenth, Eleventh, and D.C. circuits). However, like the Ninth Circuit below, the majority of these circuit courts cite *Buckley's* "major purpose" analysis as a judicial construction to narrow what was an otherwise unconstitutional specific federal statutory definition of political committee. Pet. App. 34a-35a; *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *CRLC*, 498 F.3d at 1153; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981), *certiorari denied*, 454 U.S. 897 (1981); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010). These courts have not, as HLW implies, interpreted *Buckley* as a constitutional mandate that an entity must only have "*the* major purpose" of supporting or opposing an election in order to be regulated as a political committee.

HLW also cites to the Tenth Circuit in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) ("*NMYO*"). Pet. 20. The *NMYO* court struck down a state law "as applied" to an organization that was deemed a political committee. *NMYO*, 611 F.3d at 677 & n.5. New Mexico argued that its $500 per year expenditure rule, standing alone, would prove an organization's major purpose. *Id.* at 677. In rejecting New Mexico's unique view of determining "major purpose," the Tenth Circuit did not endorse a rigid requirement of "*the*" major

purpose. It cites *Leake*, but merely for a broad proposition that, under *Buckley*, classification as a political committee should reflect major purposes, not an expenditure trigger like $500 per year. In light of the court's discussion and the fact-bound nature of the ruling, *NMYO* is not comparable to the decision below.

Finally, HLW argues that there is conflict within the Ninth Circuit. Pet. 32. This argument has no merit. The Ninth Circuit addresses and resolves prior circuit cases by adopting and following this Court's cases. Pet. App. 20a-25a. There is also no merit to HLW's claim that the court of appeals opinion here conflicts with its prior opinion in *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (*"CPLC-II"*). Pet. at 20. *CPLC-II* specifically held that "irrespective of the major purpose of an organization, disclosure requirements may be imposed." Pet. App. at 34a (quoting *CPLC-II*, 507 F.3d at 1180 n.11).

HLW's claimed conflict with other circuits regarding the level of scrutiny and the major purpose analysis has no merit, and does not warrant review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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